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COURT OF CRIMINAL APPEALS
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No. PD-0408-21

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS
Appellant/ Petitioner

v.

SYED SARTAJ NAWAZ
Appellee/ Respondent

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On Discretionary Review From

The Fifth Court of Appeals, Dallas in No. 05-19-0092-CR and The 199th Judicial District Court Of Collin County in Cause No. 199-81120-2017

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RESPONDENT'S BRIEF

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ISSUE PRESENTED

In concluding that Appellee's Convictions for injury to a child causing serious bodily injury and injury to a child causing serious mental deficiency, impairment, or injury violated double jeopardy, did the court of appeals erroneously focus on the transaction rather than the result?

SUMMARY OF APPELLEE'S ARGUMENT

The court of appeals focused on the result. "Shaken Baby Syndrome" (SBS) is now referred to as "Abusive Head Trauma" (AHT). The appeals court was clear it referred to AHT as an injury and was the basis for each conviction. The appeals court was also clear the brain injury was severe enough to trigger other related injuries to A.R.'s brain. The appeals court took the terminology of the cause "non-accidental" and the injury "AHT" directly from the state's experts' terminology in the record. This case fails both the *Ervin* analysis and/or the "Units" regardless of which is ultimately utilized by this Court. The State seeks to cherry-pick from the record other chain-reaction injuries to the brain to differentiate the two convictions and rescue them from double jeopardy. The State concedes, though, both convictions stem from the brain injury itself – which seems to agree with the appellate court they claim to dispute on the same issue.

RELEVANT PORTIONS OF THE TRIAL RECORD

Syed Sartaj Nawaz ("Appellee") is an Indian Immigrant who came to America to further his education. He received a degree from Muffakham Jah College of Engineering and Technology. (RR Vol. 5, P. 106, Ln. 5 – 11). He moved to North Texas to be near his uncle who had previously emigrated here. He commuted from his home in Collin County to Texas A&M Commerce where he attended post graduate classes (RR. V. 5, P. 109, Ln. 12 – 22). He graduated with a master's degree (RR. Vol. 5, P. 112, Ln. 22, - P. 113, Ln. 2). He met and married Natalie Rossi but he kept his marriage a secret from his family. Appellee was possibly worried to tell his family because in India his marriage would have been arranged (RR Vol. 5, P. 100, Ln. 6 – 18). He also was initially unprepared to be a biological father (RR. Vol. 5, P. 110, Ln. 16 – 19). Natalie elected to be impregnated through a sperm donor. A.R. was born to Natalie and Appellee, on July 20 of 2016 (RR. Vol. 3, P. 10, Ln. 15 – 17). Appellee was A.R.'s main caregiver as his immigration status did not allow him to work at the time (RR Vol. 5, P. 114, Ln. 3 – 13).[1]

A.R. was born via caesarean section and had the complication of being born with a congenitally dislocated knee (RR. Vol. 3, P. 12 Ln. 4 – 7) (RR Vol. 3, P. 25, Ln. 15 – 18). Shortly after birth she was jaundiced and had thrush for which she

[1] None of these background facts for Appellee were known to the Jury until the punishment phase.

was given medication (RR. Vol. 3, P. 33, Ln. 15 – 17) (RR Vol. 3, P. 34, Ln. 24 – P. 35, Ln. 1). Appellee and his wife brought A.R. to multiple checkups in the roughly two months they had A.R. and at no time was abuse suspected (RR. Vol. 3, P. 31, Ln. 11 – P. 34, Ln. 1).

On September 18, 2016, A.R. fell off of a mattress causing slight bruising in several spots on her forehead. Appellee and Ms. Rossi applied iodine to the spots as they thought it would be helpful. The following day Appellee took his wife to the DART station so she could commute to work. He took A.R. to her 2-month well checkup to Dr. Chad Gusterloh's office, a board certified pediatrician in private practice (RR Vol. 3, P. 163, Ln. 3 – 20). Dr. Gusterloh was made aware by Appellee of A.R.'s fall and the iodine put on A.R.'s head in several spots (RR Vol. 3, P. 37 Ln. 21 – P. 38, Ln. 2) (RR Vol. 3, P. 39, Ln. 13 – 25). Dr. Gusterloh felt like A.R. was fine after the fall and had one of his nurses attempt to remove as much iodine as possible and she was able to remove most of it (RR Vol. 3, P. 39 Ln. 20 – P. 40, Ln. 6). Dr. Gusterloh felt it would be appropriate to administer a panel of approximately 5 vaccines that morning to A.R. as part of her 2-month well check-up (RR Vol. 3, P. 43, Ln. 14 – P. 44, Ln. 6).

Appellee took A.R. home and was the only adult with her (RR Vol. 3, P. 163, Ln. 13 – P. 164, Ln. 17). Appellee noticed she wasn't feeding much and seemed lethargic. A.R. took a nap and was woken up by Appellee who tried to

feed her. She wouldn't take her normal bottle and she spat-up. (RR. Vol. 3, P. 163, Ln. 20 – P. 164, Ln. 20). When Natalie got home the baby was described as kind of lethargic and cool to the touch (RR. Vol. 3, P. 167, Ln. 19 – 22). The couple was told to take the baby to the hospital (RR. Vol. 3, P. 168, Ln. 1 – 4).

Dr. Michael Cooper was the ER doctor, with approximately 2 years of experience since completing his education and rotations, who saw A.R. when she got to Children's Medical Center of Plano (RR. Vol. 3, P. 58, Ln. 9 – 16). She was critically ill when she arrived. Her breathing was intermittent with apnea at times and rapid at other times (RR. Vol. 3, P. 83, Ln. 14 – 20). She looked pale and her heart rate would fluctuate from very slow to very fast. Her oxygen levels in her blood had fallen requiring her to breathe through a mask (RR. Vol. 3, P. 83, Ln. 22 – P. 84, Ln. 9). The marks on her head where the iodine had been rubbed off were described by Dr. Cooper as "some sort of rash" (RR. Vol. 3, P. 87, Ln. 18 – P. 88, Ln. 5).

A.R. was medically sedated (RR. Vol. 3, P. 88, Ln. 13 – 23). Other than the iodine spots there was no evidence such as external bruising on the baby's neck, arms, legs, torso or anywhere else on her body (RR. Vol. 3, P. 92, Ln. 20 – 23) (RR. Vol. 3, P. 130 Ln. 7 – 23). Dr. Cooper indicated the CT scan taken of A.R.'s brain showed multiple areas of bleeding in her brain – subdural hematomas,

intraparenchymal hematoma, and bleeding around the area of the clivus which is where the skull meets the spinal cord (RR. Vol. 3, P. 93, Ln. 10 – 13).

Appellee and A.R.'s mother were repeatedly questioned about the baby's injuries what seemed to be "every 5 seconds" (RR. Vol. 5, P. 120, Ln. 16 – 21). Tamara Brown with Chirldren's Medical Center interviewed them (RR Vol. 2, P. 252, Ln. 11 – 17). A night investigator named Kelly Mitchell interviewed them (RR. Vol. 3, P. 212, Ln. 1 – 5). Detective James Phelan interviewed Appellee twice (RR Vol. 3, P. 177 Ln. 23 – P. 178, Ln. 6). Susan Connelly with CPS Interviewed them (RR Vol. 3, P. 204, Ln.16 – 18). Dr. Kristen Reeder interviewed them (RR. Vol 3, P. 238, Ln. 20 – P. 239, Ln. 15). If there was an inconsistency in Appellee's story to any of them – it was so minor as to not have even been mentioned in the State's closing argument. One complaint about Appellee was his demeanor was flat (RR. Vol. 2, P. 242, Ln. 2 – 6).

Dr. Cooper was originally concerned about sepsis or some other type of infection the baby was having like meningitis. He thought when a baby comes in with apnea – these types of infection are a primary concern. The staff at the hospital was able to conduct some tests after A.R. was stabilized. (RR. Vol. 3, P. 91 Ln. 10 – 25). Dr. Cooper's initial diagnosis was non-accidental trauma (RR. Vol. 3, P. 101, Ln. 4 – 14). He felt like the initial or partial lab results (learned days later) pointed away from infection and the multiple areas of bleeding pointed

away from a stroke (RR. Vol. 3, P. 101, Ln. 15 – P. 102, Ln. 15) (RR. Vol. 3, P. 102, Ln. 21 – P. 103, Ln. 10).

A.R. was transported via ambulance to Children's Medical Center of Dallas in the early hours of the following morning (RR. Vol. 3, P. 107 Ln. 20 – 24). Once in Dallas, A.R. began to improve and was seen by pediatric ophthalmologist Dr. Yu-Guang He. Dr. He testified the retina is part of the brain. (RR. Vol. 4, P. 32). Dr. He characterized A.R.'s injuries to her retinas as "one of the most severe" he has seen (RR. Vol. 4, P. 42, Ln. 23 – P. 43, Ln. 5). He diagnosed her with retinal hemorrhaging because he believes the shearing force can cause vitreous gel in the eye and the retina to be broken (Vol. 4, P. 33, Ln. 2 – 9).

Appellee was subsequently arrested. At a bond hearing in the weeks that followed, it became known Appellee's wife was in possession of a video. At the bond hearing Ms. Rossi characterized Appellee's handling of the baby as being held incorrectly but certainly not "shaking" nor "violently shaking" nor "strangulated." (Expanded Record, P. 42, Ln. 11 – P. 43, Ln. 8).

At Trial:

Dr. Chad Gusterloh testified he had no concerns of abuse in previous visits (RR. Vol. 3, P. 36 Ln. 4 – 6). Dr. Gusterloh agreed with Defense counsel that "shaken baby syndrome" ("SBS") has changed during the years, discussed some of

the medical particulars of such cases, and that his particular knowledge of SBS has declined over the years (RR. Vol. 3, P. 52, Ln. 21 – P. 55, Ln. 2).

Dr. Cooper testified he agreed SBS was now known as "Abusive Head Trauma" ("AHT"), He further testified he was aware of studies showing it was not shaking but cervical injuries that are leading to the brain injury in his 705 hearing (RR. Vol. 3, P. 69 Ln. 13 – 20). He did not know how the injury occurred (in the presence of the jury) (RR. Vol. 3, P. 109, Ln. 14 – 16). Dr. Cooper admitted the CT of the cervical spine was not indicative of major cranial cervical ligamentous injury (RR. Vol. 3, P. 143 Ln. 16 – P. 144, Ln. 10).

The State also called Dr. Reeder of the Referral and Evaluation of at Risk Children ("REACH") team (RR Vol. 3 P. 232, Ln. 3 – 6). Dr. Reeder testified:

> Abusive head trauma is a term that describes injuries in the head that are not caused by accident. So again, it is not one specific injury or one, you know, group of injuries, or anything like that. It can be different in different situations; but ultimately it is injuries to the head that are not explained by the history that is given.

(RR. Vol. 3, P. 265, Ln. 23 – P. 266, Ln. 4).

Her opinion was this injury to A.R. was caused by a shaking type mechanism but can't be more specific than that (RR. Vol. 3, P. 266, Ln. 10 – 25). She also believes the injury was possibly caused by the child being thrown onto something soft such as a theoretical couch or pillows that wouldn't cause a fracture or bruise to the outside of the head. (RR. Vol. 3, P. 282, Ln. 4 – 21). Dr. Reeder

opined hands are capable of causing serious bodily injury or death (RR. Vol. 3, P. 283 Ln. 3 – 10). She claimed A.R. needed continued therapy multiple times a week to get her to a developmental level that would be more appropriate for her age and that she was not reaching her developmental milestones as a result of her traumatic brain injury (RR. Vol. 3, P. 284, Ln. 12 – P. 286, Ln. 12). She agreed Dr. Whittemore who is one of A.R.'s physicians who actually attended to A.R., interpreted CT scans to say A.R.'s cervical spine was not suggestive of major craniometrical ligamentous injuries (RR. Vol. 3, P. 317, Ln. 23 – P. 318, Ln. 15).

The State called Dr. Yu-Guang He. Dr. He is board certified in Ophthalmology (RR. Vol. 4, P. 22, Ln. – 16). Dr. He testified the retina is part of the brain. (RR. Vol. 4, P. 32). Dr. He agreed subdural hematomas and retinal hemorrhages can be associated with one another and not be a function of SBS (RR. Vol. 4, P. 55, Ln. 12 – 24). Dr. He testified it will be unlikely the child will obtain useful vision and she is functionally blind due to her injury (RR. Vol. 4, P. 46, Ln. 4 – 15).

The final witness for the State in Guilt/ Innocence was Court Appointed Special Advocate ("CASA") volunteer Cathy Carter (RR. Vol. 4, P. 75, Ln. 11). Ms. Carter was retired from operating an embroidery athletic lettering company (RR. Vol. 4, P. 113, Ln. 12 – Ln. 13).

Ms. Carter claims she was present at a legal proceeding for CPS and met with Natalie Rossi's attorney. Ms. Carter described in the video Appellee with his hand around her neck and "this child had a horrid – just a look of horror on her face" (RR. Vol. 4, P. 82, Ln. 17 – P. 83, Ln. 19). Presumably this is one and the same video described by Ms. Rossi at Appellee's writ hearing where she said Appellee mishandled but did not shake the baby and from Ms. Connelly who clearly did not share Ms. Carter's interpretation of the video (we have no way of knowing if they saw the same video). Ms. Carter did not know when the video was taken (RR. Vol. 4, P. 85, Ln. 6 – 11). Ms. Carter assumes the video was taken the date of the allegation (RR. Vol. 4, P. 85, Ln. 12 – 18). Somehow, two screenshots survived and were entered into evidence ultimately as State's Exhibit 12 (RR Vol. 6, State's Exhibit 12) (RR. Vol. 6, State's Exhibits 3 – 4).

Appellee called one witness in his Defense. Dr. Joseph Scheller is a practicing pediatric neurologist from Baltimore, Maryland and has been practicing for 31 years (RR. Vol. 4, P. 238 Ln. 8 – 13). He is a board certified pediatrician and is a pediatric neurologist (RR Vol. 4, P. 239 Ln. 5 – 8) (RR. Vol. 4, P. 240, Ln. 1 – 4). He has been recognized as an expert witness specifically in field of neuroimaging over fifty times (RR. Vol. 4, P. 219 Ln. 9 – 15). Dr. Scheller testified during the 705 hearing retinal hemorrhages occur because of damage in the brain and the retina is a "bystander" to that (RR. Vol., 4 P. 165, Ln. 7 – 19).

Appellee rested and closed his case (RR. Vol. 4, P. 292 Ln. 7-8).

The jury convicted Appellee on both counts and found the deadly weapon finding to be true (RR. Vol. 5, P. 50 Ln. 8 – Ln. 21).

Both Appellee and the State rested and closed on punishment and gave closing arguments. The jury wrote two notes during its punishment deliberations. The first note asked if they could put him in prison on one count and probate the second count. The second note asked whether the sentences would be consecutive or concurrent. The Court could answer neither note other than to instruct them they had all the evidence needed (RR. Vol. 5, P. 152, Ln. 11 – P. 156, Ln. 5).

The jury sentenced Appellee to 16 years on each count. The trial court stacked the sentences referencing TEX.CRIM.PROC. ART. 42.08 and sentenced Appellee (RR. Vol. 5, P. 157, Ln. 14 – P. 160, Ln. 11).

ORIGINAL APPEAL

Points of Error Presented

(1) Double Jeopardy due to the punishment and conviction based on the same conduct and same result;
(2) In the alternative to the first issue – that proof of count II was merely an alternate way of proving Count I and therefore Count II failed on sufficiency analysis;

(3) The Trial Court allowed a CASA worker to express verbal expressions or their equivalent in allowing her to project and express her own emotions as if those were an infant's expressions violating the due process and confrontation clauses to the U.S. Constitution;
(4) The Court erred when it did not require the State elect a manner and means;
(5) The State argued outside the record to inject otherwise absent 'evidence' of motive;
(6) The Court improperly micromanaged and limited Defense expert Dr. Joseph Scheller, a pediatric neurologist, in the TEX.R.EVID. 705 hearing and improperly limited his testimony before the jury; and
(7) The special issue verdict for a deadly weapon lacked unanimity.

State's Argument on Direct Appeal

The State's argument on direct appeal for Appellee's first issue is substantially similar to their current complaint.

Ruling of Fifth Court of Appeals in Dallas

Appellee originally brought seven issues on direct appeal. The first was sustained. The second issue was unaddressed due to the first issue being sustained. Issues three, four, five, six and seven were over-ruled by the Court of Appeals.

On the first point of error – the Fifth Court agreed the offenses under TEX.PENAL CODE. § 22.04(a)(1) and (a)(2) were result oriented. The court of appeals used the language of the State's own expert witnesses to characterize the

sole injury in this case – "abusive head trauma." The court of appeals analyzed the case based on this Court's precedent in *Villanueva v. State*, 227 S.W.3d 744, 747 (Tex.Crim.App. 2007) which also analyzed a double jeopardy issue from Chapter 22.04 of the Texas Penal Code. That is, the court of appeals recognized it was a double jeopardy issue predicated on multiple punishments for the same offense. It utilized the tests also used in *Villanueva* being the *Ervin* test along with the cognate-pleading rule to determine the legislative intent. The court of appeals applied the *Ervin* factors to the instant case and found the State could not overcome the presumption of double jeopardy.

The court of appeals also engaged in a "units" analysis yet still concluding the injuries were identical.

ARGUMENT AND AUTHORITIES

The Court of Appeals Focused on the Injury and used the State's Expert's Terminology to Define Both the Singular Cause and the Singular Injury

The State somewhat patronizes the appellate court. They claim the Court confused the mechanism of injury with the result of the injury. The appellate court was clear. There was one legal cause. There was one legal injury.

> A.R.'s injury was non-accidental abusive head trauma used by a whip-lash type movement of her head. **This single injury** caused both the hemorrhaging in A.R.'s Retina and the holes in A.R.'s brain.

See Nawaz v. State, 2021 WL 1884551, *5 (Tex.Ct.App. Dallas, 2021) (emphasis added).

The court used the term "non-accidental" before the term "abusive head trauma." It is clear the Court did so to denote cause and effect and use the identical words just like the State's experts Dr. Cooper and Dr. Reeder did on the record in this case. (RR. Vol 3, P. 101, Ln. 4 -14) and (RR. Vol. 3, P. 265, Ln. 23 – P. 266, Ln. 4). They even used Dr. Reeder's description of "whip-lash type motion" taken directly from the State's original brief. See State's brief, P. 4. Just as the injury of a severed spine can cause paralysis below the waist – so did the AHT cause the retinal hemorrhaging.

Recall "Shaken Baby Syndrome" is a *syndrome* or a result. AHT has medically replaced "Shaken Baby Syndrome" (RR Vol. 3, P. 69). It would further seem a syndrome would logically describe a diagnosis or injury. We wouldn't even be having this debate if the appeals court instead said, "A.R.'s injury was non-accidental shaken baby syndrome…" It is the State confusing AHT as the act and not the fact AHT describes the injury – and other injuries in fact were a product or an extension of the original injury.

Both SBS and AHT are admittedly confusing terms because they describe injury and are descriptive of the cause too. Other similar injuries describing both cause and effect could be perhaps, a punctured lung, a smashed finger, or a gunshot

wound. Those are all injuries which also describe, to some extent, how they happened. It doesn't mean someone isn't describing the injury when they say, "the patient in room c has a gunshot wound." There are surely other examples of descriptive diagnoses beyond injuries such as clogged arteries, swollen tonsils, or restless leg.

The State quotes Dr. Reeder utilizing the terminology of AHT both in terms of cause and effect. But the Court of Appeals not only made clear they referred to AHT in the context of the injury itself – they expounded on the cause by quoting Dr. Cooper's "non-accidental" trauma as well as Dr. Reeder's description of a "whip-lash" motion. *Id*. It is the State confused by this terminology – not the court of appeals.

Justice Cochrane noted in the tragic *Villanueva* case, "Little Greg could die but once." *Villanueva v. State*, 227 S.W.3d 744, at 751. Under the current statutory framework, and the pleadings in this case, there is no indication a singular organ can be injured more than once regardless of whether it is brain, heart or the appendix.

These Convictions are Carbon Copies of One Another For the Purposes of Blockburger

Count I of the indictment alleged appellee committed the offense of knowingly causing serious bodily injury to A.R., a child under the age of 14. Count II alleged appellee committed the offense of knowingly causing serious mental deficiency, impairment and injury to A.R.

Serious bodily injury is legally defined as, "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of ***any bodily member or organ***." TEX. PENAL CODE § 1.07(46) (emphasis added). This definition was given in the jury charge. Serious mental deficiency, impairment and injury has no similar legal definition and so no definition was given to the jury.

The proof at trial was A.R. suffered injuries including bleeding in the brain, holes in the brain, and retinal hemorrhaging (the retina being part of the brain according to the State's expert, Dr. He). (RR. Vol. 4, P. 32).

In other words – the jury determined A.R. suffered the "protracted loss or impairment" of the function of her brain in Count I of the indictment.

Count II alleged appellee committed the offense of knowingly causing serious mental deficiency, impairment and injury to A.R. Dr. Reeder attributed the mental impairment and injuries to her traumatic brain injury. (RR. Vol. 3, P. 284,

Ln. 12 – P. 286, Ln. 12). In other words – the jury determined A.R. suffered the 'protracted loss or impairment' of the function of her brain yet a second time.

The State did not allege distinct culpable acts, nor did they prove at trial distinct culpable acts. For as many injuries the State tries to conjure from the record they pled and proved one.

While carefully mincing and shredding the record for any nugget of a different injury they can claim – the State just as willfully ignores the *Ervin* analysis and framework because they know it to be fatal. They hope This Court does likewise. Ultimately it doesn't even matter because this case just as badly fails a "units" analysis as it does the *Ervin* analysis.

Double Jeopardy Involving Multiple Punishments and Sameness

The Double Jeopardy Clause of the Fifth Amendment, which the United States Supreme Court has held to be applicable to the states through the Fourteenth Amendment, is understood to incorporate three protections: (1) protection against a second prosecution for the "same" offense following an acquittal; (2) protection against a second prosecution for the "same" offense following a conviction, and (3) protection against multiple punishments for the "same" offense. *Ramos v. State*, -- WL – (Tex.Crim.App. 2021), *Kuykendall v. State*, 611 S.W.3d 625, 627 (Tex. Crim. App. 2020).

The traditional starting point for determining "sameness" for multiple-punishments double-jeopardy analysis is the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Under *Blockburger*, two separately defined statutory offenses are presumed *not* to be the same so long as each requires proof of an elemental fact that the other does not. *Littrell v. State*, 271 S.W.3d 273, 276 (Tex. Crim. App. 2008); *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014). In comparing elements of the different statutory provisions, this Court has said, "[w]e not only examine the statutory elements in the abstract[,] but we also compare the offenses as pleaded[.]" *Shelby*, 448 S.W.3d at 436; *see also Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008). This Court has expressly stated, "when resolving whether two crimes are the same for double-jeopardy purposes, we focus on the elements alleged in the charging instrument." *Id*.

Blockburger and it's Relationship to Legislative Intent

Blockburger operates as a rule of statutory construction creating a rebuttable presumption which may be overcome. *Ramos* at *6. *Blockburger* does not negate otherwise clearly expressed legislative intent. *Villanueva v. State*, 227 S.W.3d 744, 747 (Tex.Crim.App. 2007).

This Court has established a non-exclusive test to determine if the legislature intended to punish conduct only once even though the conduct violated separate

statutory provisions stemming from *Ervin v. State*, 991 S.W.2d 804, 807 (Tex.Crim.App., 1994).

The non-exclusive *Ervin* list is as follows:

(1) Whether the offenses are in the same statutory section;

(2) Whether they are phrased in the alternative;

(3) Whether the offenses are named similarly;

(4) Whether they have common punishment ranges;

(5) Whether they have a common focus;

(6) Whether the common focus tends to indicate a single instance of conduct;

(7) Whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and

(8) Whether there is a legislative history containing an articulation of an intent to treat offenses as the same for double jeopardy purposes.

Ervin at 814.

In October, 2021, this Court has clarified the gravamen of the offense – or the focus of it – is analyzed as the fifth and sixth factors of *Ervin*. *See Ramos v. State*, -- S.W.3d at 14.

Ervin is the Obvious Analytical Tool and has Been Used by This Court to Analyze This Section of the Penal Code for Double Jeopardy Already

The *Ervin* non-exclusive list of factors analyzing legislative intent for duplicitous punishment would seem to be the obvious analytical tool here. Indeed, this Court has already utilized the *Ervin* factors for evaluating TEX. PENAL CODE § 22.04 in *Villanueva*. *See Villanueva* at 748. It further seemed this court's recent utilization of and description in *Ramos* made clear the gravamen of such offenses were contemplated by *Ervin*. The State offers no persuasive guidance to take this case out of the *Ervin* analysis but it is understandable they would want to avoid *Ervin* if at all possible. The State proposes this Court rewrite the entire framework by using *Garfias v. State,* 424 S.W.3d 54 (Tex.Crim.App. 2014) but gives little persuasive reasoning why.

The State doesn't even analyze the *Ervin* factors in it's brief – because they know them to be kryptonite to their argument. They would rather have this Court smudge the lens for all Texas trial courts and courts of appeal in the future by making *Blockburger* and *Ervin* optional merely because an offense may be result-based. They ignore this Court's recent *Ramos* opinion analyzing the fifth and sixth prong of the *Ervin* and explaining the gravamen of the offenses is accounted for by *Ervin*. See *Ramos* – S.W.3d --, P. 15.

The unit of prosecution is not the end-all of the analysis either. Even with the *Ervin* analysis it is double jeopardy to convict on more than one unit of prosecution as was done here. This Court has repeatedly held that if the offense is result-of-conduct then each type of statutorily defined result constitutes a separate offense. Because there is *but one* result here – it's double jeopardy.

All 8 of the Ervin Factors Are Resolved in Appellee's Favor.

Because the State cannot escape the non-exclusive *Ervin* factors this Court needs to engage in the *Ervin* analysis. It shows the State cannot rebut the presumption of double jeopardy here.

Are the offenses in the same statutory section? Yes.

Are the offenses phrased in the alternative? Yes.

Are they named similarly? Yes.

Do they have common punishment ranges? The punishment ranges are not only identical they are described in the exact subsection and described together. TEX. PENALCODE. § 22.04(e) says, "An offense under subsection (a)(1) or (a)(2)… is a felony of the first degree when the conduct is felony in the second degree."

Do they have a common focus? Yes. Both are result oriented based on the gravamen of the offenses. *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2006), *Villanueva*, 227 S.W.3d at 748. What is important here is not that these are

result based offenses – what is important is the gravamen of both 22.04(a)(1) and (a)(2) are identical.

Does the common focus tend to indicate a single instance of conduct? If you are to believe the State and their pleadings then absolutely. There is only one instance of conduct alleged combined in both counts.

Can the differing elements between the two offenses be considered the same under an imputed theory of liability that would result in the offenses being the same under *Blockburger*? The differing elements are only based on the type of injury. It should be noted, however, there is a statutory definition for "serious bodily injury" which can be and was submitted to the jury in this case. There is no statutory definition for what could be considered a "serious mental deficiency, impairment or injury." But again – the State's evidence in this case is that the impairment to satisfy TEX. PENAL CODE § 22.04(a)(2) was a "brain injury." Put another way, "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE. § 1.07(46). This record shows the potential over-lap is more than theoretical.

It should be finally noted too this Court has ruled the legislative intent in TEX.PENAL CODE. § 22.04 to be different ways of committing the same offenses,

albeit in the context of jury unanimity. *See Jefferson v. State*, 189 S.W.3d 305 (Tex.Crim.App., 2006).

Also it is conceivable that in instances like this – the legislature was more concerned with making sure each and every emotional or non-tangible injury was criminalized than they were at that moment about maximizing punishment. This would explain overly-broad, undefined, and moderately clunky language of TEX.PENAL CODE. § 22.04(a)(2).

Indeed, it is almost as if the *Ervin* test was written for the facts of this case.

The Cognate-Pleadings Requirement – We Analyze What's Pled

Whether a court is comparing elements pursuant to *Blockburger* or *Ervin*, the offenses compared in elements analysis are derived solely from the pleadings and the relevant statutory provisions. *Ex Parte Benson*, 459 S.W.3d 67 (Tex.Crim.App. 2015) citing *Hall v. State*, 225 S.W.3d 524, 532-33 (Tex.Crim.App. 2007).

This Court utilizes the cognate-pleadings approach. *See Bigon v. State*, 252 S.W.3d 360 (Tex.Crim.App. 2008) citing *Hall v. State*, 225 S.W.3d 524 (Tex.Crim.App. 2007). In comparing elements of the different statutory provisions, this Court has said, "[w]e not only examine the statutory elements in

the abstract[,] ***but we also compare the offenses as pleaded***[.]" *Shelby*, 448 S.W.3d at 436 (Emphasis added).

This approach only makes sense. It's not fair for the State to point to what they claim to be different injuries on appeal and claim "*see – this isn't double jeopardy because we proved those other things too…*" The State didn't plead different or specific injuries nor did they make a meaningful election at the jury charge conference about injuries when given the chance. Finally the jury didn't tell us which part of the definition was proven beyond a reasonable doubt.

The state wants this Court to analyze multiple "separate and discrete" injuries of serious bodily injury yet they only pled one statutory result of serious bodily injury. Thus, a serious debate about "separate and discrete" injuries are reserved for instances where the State actually pleaded them.

What is a "Separate and Discrete" Injury – and Why It Doesn't Matter Here

Texas law authorizes multiple convictions for "separate and distinct" offenses and has at least since Joe Luna sold heroine to an undercover Lubbock Police officer in 1970 more than once on the same day. *See Luna v. State*, 493, S.W.2d 854 (Tex.Crim.App. 1973). This court opined in dicta in *Villanueva* because the State may be entitled to two convictions for two separate and *discrete*

incidents, each comprising criminal offenses on the same date, then there might be a circumstance where the following might happen:

> Had the appellee continued to prevent Legg (victim's mother) from taking G.V. to the hospital to the hospital on the morning of July 30th, when G.V's condition was obviously deteriorating and it was apparent that he might suffer further serious injury absent medical intervention we think that the principle in *Luna* could well apply. Under those hypothetical circumstances, it could reasonably be said that the failure to seek treatment for G.V.'s apparent injuries resulted in a separate and discrete, or at least incrementally greater, injury for which the appellee could also be held criminally accountable without violating double jeopardy.

Villanueva at 749 (emphasis added).

Again, necessarily assumed in this hypothetical is these separate and discrete offenses be itemized before hand – that is pleaded and then proven beyond a reasonable doubt. To assume otherwise would be a shocking deprivation of due process.

"Separate" is defined by Meriam Webster's Dictionary as an adjective meaning "not shared with another: individual." *See Meriam-Webster.com/dictionary/separate*.

The retinal injury is not separate from the brain injury/ AHT. The State's ophthalmological expert, Dr. He testified the retina is part of the brain. The State even reiterated that by citing it in their own brief to this Court. See 4 RR 32, State's Brief footnote 3. The retinal injury is by the record and all the medical

evidence in this case related to, a continuation of, or a chain-reaction of the brain injuries also described at trial such as a brain bleed and holes in A.R.'s brain. This is an injury described by REACH Dr. Reeder as "Abusive Head Trauma." Even Defense Expert Dr. Scheller characterized the retinal injury as a "bystander" injury to the brain injury. (RR. Vol., 4 P. 165, Ln. 7 – 19).

The state believes the "separate and discrete" verbiage to be an invitation to treat a double jeopardy analysis like a sufficiency discussion. They wish to point to anything and everything on the record they believe to be a "separate and discrete" injury even though there's no evidence on the record an additional injury to the brain is "separate." In fact, they ask this Court to disagree with their own Board Certified Ophthalmologist who says the retina is part of the brain.

Lastly, Judge Cochran's hypothetical also opined the "separate or discrete" injury should at least be "incrementally greater." There is no evidence the State can point to here that the retinal hemorrhaging is incrementally worse than the holes in A.R's brain and/or brain bleed.

Why The Injuries are Identical for Each Count

The holes in A.R.'s brain are an injury to the brain. The bleeding in A.R.'s brain was an injury to the brain. The retinal hemorrhaging – according to the State's own expert – was an injury to the brain.

The human body has 78 organs not counting individual bones and teeth. *See medicine.com/how_many_organs_are_there_in_the_body/article.htm.* A singular blow to the brain (abusive head trauma – retinal hemorrhaging, brain bleeding, or any other way to describe a brain injury) may cripple conceivably other body 'members' or a number of different internal organs.

An even more clear example would be a single act causing a single spinal injury to a child rendering a child paraplegic. Is the paralysis to each leg a "separate" injury or is it really a chain-reaction injury dependent on the original spinal injury? Candidly this just shows us clearly how difficult a task it is for the legislature to balance criminal justice, due process and square it with the amazingly complex human body.

An important consideration here is to compare TEX. PENAL Code § 22.04(a)(1) with TEX. PENAL CODE § 22.04(a)(3) – or "serious bodily injury" with "bodily injury." Can This Court seriously conclude that if a criminal defendant painfully caused the protracted impairment of a bodily organ the State can convict defendant twice? Once for the pain caused and once for the bodily organ impairment? Assuming the answer is no, then the legislature must not have intended multiple punishments under the same scheme.

Put simply in legal terms – retinal hemorrhaging, holes in A.R.'s brain, and brain bleeding are all brain injuries according to the record in this case. They are, for better or worse, alternate ways of proving the same thing.

One legal injury was the basis for both result-based convictions. That is why this is double jeopardy.

Response and Rebuttal to State's Arguments

The State contends (1) they proved retinal hemorrhaging to satisfy Count I, the Serious Bodily Injury; and (2) a traumatic brain injury to satisfy count II, the serious mental deficiency, impairment or injury. This argument is perplexing given the State also concedes the retina is part of the brain.

It is hard to know if the State also takes the position that if the retina wasn't injured – do they think the evidence of the subdural hematoma, brain bleed, and holes in the brain were somehow insufficient to prove serious bodily injury? Is it further their position the legislature did not intend to punish a child abuser through 22.04(a)(1) who injured a child's brain to the degree it caused them to suffer mental retardation? Of course the State would never take these positions. So why, then, does the State feel entitled to a tidy itemization of this general jury verdict neatly carving out their retinal injury from the other brain injuries for *their* benefit? The principals of lenity and the U.S. Constitution protect individuals, not the State.

Appellee reminds This Court the State concedes yet still argues:

> …even though A.R.'s serious bodily injury and serious mental deficiency, impairment, or injury both stemmed from injuries to her brain… because the end results were two *different kinds* of injuries separately contemplated by the legislature.

See State's Brief, P. 36 (emphasis added). If only TEX. PENAL CODE § 1.07(46) criminalized "*different kinds*" of injuries instead of injuring "members or organs" then the State would be correct in this case. It seems as though both the State and Appellee agree the injury was identical. Appellee struggles, then, to understand the State's complaints about the Appellate Court's ruling.

Final Summation – If The State Wants to Be Able to Convict on Chain Reaction Injuries on Result Based Crimes the Legislature Must Act

Sometimes we have to recognize the human body, all its complexities, all it's intricacies and medicine's increasing knowledge of it simply out-paces legislators and prosecutors. The State of Texas and the legislature do their best to play a game of checkers when it comes to balancing public interests in protecting children, punishing child abusers, and satisfying due process when it comes to child injuries. But the human body and all its intricacies and complexities is a game of chess, not checkers.

The law just isn't what the State of Texas wants it to be. The State argues they can stack a 7,722 year sentence together in a case where a child is on a

ventilator in a permanent vegetative state due to a singular catastrophic blow to the head triggering the incapacity of all 78 organs in the human body. In fact, the State by their logic here actually feels entitled to an infinite amount of convictions because they think each and every "*different kind*" of injury is a separate unit of prosecution.

Did the legislature write a poor or unclear statute when they wrote TEX. PENAL CODE. § 22.04(a)(1) and (2)? Giving them the benefit of the doubt – the human body is, again, extraordinarily complex. Delineating criminal penalties for certain results while keeping an eye towards constitutional protections is extremely hard work. The kindest way to describe the language of TEX. PENAL CODE. § 22.04(a)(2) criminalizing the causing of "serious mental deficiency, impairment or injury" to a child is this – it is clunky language probably designed to be a catch-all alternative to make sure non-tangible injuries were criminalized too. We see the result of that overly-broad clunkiness in this case where the State was able to bootstrap a brain injury into convictions on both (a)(1) and (a)(2).

The State further could have avoided this debate multiple ways and is not left without a roadmap in the future. They could have pleaded each "separate and discrete" injury. Then they may learn if this Court is then willing to entertain the dicta from *Villanueva* – that these separate and discrete injuries are detached

enough from one another to satisfy due process if they can attain multiple convictions.

Instead the State asks This Court to ignore *Ervin* and the cognate-pleadings requirement because it's easier. They ask this court to do a "unit" based analysis only to unpersuasively argue all the injuries are separate – because they are separate.

It's hard to envision any legislator wanting to give a child abuser a break. The broad and clunky verbiage, though, of TEX. PENAL CODE. § 22.04(a)(2) is evidence the legislature wasn't focused so much on punishment here but making sure emotional, psychological or more subtle injuries would not 'fall through the cracks.' All of the analytical tools and time-tested cases point to one intended punishment. And it's not particularly close.

Appellee respectfully requests this Court strike the conviction under (a)(2) due to double jeopardy based on the specific facts and record in this case.

PRAYER FOR RELIEF

WHEREFORE ALL PREMISES CONSIDERED Appellee respectfully prays this honorable court grant any and all relief in law and equity to which he is justly entitled.

Respectfully Submitted,

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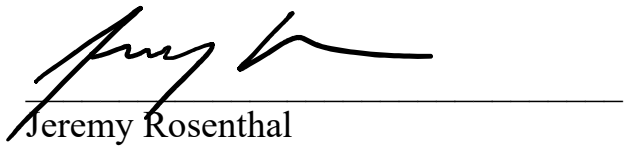
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion to Extend Time for Filing of Brief was served upon the opposing counsel for the State of Texas, by and through the Collin County District Attorney's Office as well as the State's Prosecuting Attorney.



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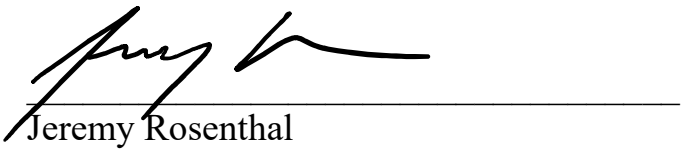
Counsel for Appellee hereby certifies the foregoing brief is in compliance with Texas Rules of Appellate Procedure. The word count reflects 7,906 words.



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